MOTION FILED
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No. 82-805

IN THE

# Supreme Court of the United States

October Term, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
*Petitioners,*

*v.*

LUBBOCK CIVIL LIBERTIES UNION,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE FREEDOM COUNCIL

## AND

## BRIEF AMICUS CURIAE OF THE FREEDOM COUNCIL

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## MOTION FOR LEAVE TO FILE BRIEF OF THE FREEDOM COUNCIL AS AMICUS CURIAE IN SUPPORT OF GRANTING CERTIORARI

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The Freedom Council respectfully moves the Court, pursuant to Rule 42, for leave to file the accompanying Brief Amicus Curiae in support of the petition for the grant of a writ of certiorari filed in the above captioned matter. The Petitioners have consented to the filing of this Brief and their letter of consent has been filed with the Clerk pursuant to Rule 36. This Motion is necessitated by Respondent's refusal to consent to the filing of the appended Brief.

As is set out in the statement of Interest of Amicus Curiae found below, amicus feels that it is uniquely qualified to assist the Court in deciding the vital issues presented by the petition herein. Amicus believes that it can add its national perspective to the issues in this case. Moreover, it will address an issue which has not been adequately presented by the parties to date: The intentions of the Framers of the First Amendment.

The issues presented in this case concern the rights of students voluntarily to express their educational, moral, ethical, and religious ideas on the public school campuses of our Nation before or after regular school hours on the same basis as other groups. These rights have been exercised by students since the founding of our Nation. For example, Thomas Jefferson and James Madison, Framers of the First Amendment, in their official capacities as Rector and Member of the Board of Visitors respectively, of the University of Virginia, expressly approved the right of students to meet for religious worship and teaching at

the public University of Virginia. The decision of the Court of Appeals in this case to prohibit such meetings, if sustained, will result in an unparalleled denial of individual freedom in this country. This matter is of direct importance to the activities of members of the Freedom Council, affiliates and related groups, whose student members have heretofore been permitted to use public school facilities for self-directed voluntary religious meetings on the same basis as other campus student groups.

It is the position of the Freedom Council that the decision of the Court of Appeals was incorrect in finding that the guideline in question constituted a violation of the Establishment Clause. In this regard, the Freedom Council wishes to bring to this Court's attention certain historical information concerning the views of Thomas Jefferson and James Madison with regard to the Establishment Clause and its application to student meetings on public school campuses.

For these reasons and those stated in the annexed Brief, it is respectfully requested that the Motion of the Freedom Council for leave to file this Brief as Amicus Curiae in support of petitioners be granted.

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DATED: November 29, 1982

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## BRIEF AMICUS CURIAE OF THE FREEDOM COUNCIL

### INTEREST OF AMICUS CURIAE

The Freedom Council, located in Virginia Beach, Virginia, is a non-profit religious corporation with a grass-roots organization established in each of the fifty States. It has representation in each State capital and congressional district throughout the land with additional chapters located on major college campuses. Additionally, The Freedom Council is closely associated with the Maranatha Campus Ministries International, which is established on seventy major college campuses both here and abroad.

The Freedom Council is closely affiliated with the Christian Broadcasting Network. The Christian Broadcasting Network is currently the nation's second largest cable TV network with direct viewing access into 20,000,000 American homes with an additional viewing audience of several million through standard VHF-UHF broadcast stations. The Freedom Council addresses, for the Christian Broadcasting Network and its membership, local and national social issues that have religious freedom implications.

The Freedom Council is dedicated to defending, restoring, and preserving religious freedom throughout the United States. The Freedom Council, and its constituency, is directly concerned with the freedom to exercise religion, as guaranteed by the Constitution, and believes that the decision of the Court below in this matter is both far reaching and of great significance.

Counsel for The Freedom Council have specialized in constitutional litigation, including the Religion Clauses of

the First Amendment. Counsel John W. Whitehead has participated in numerous cases involving the Religion Clauses, serving as special constitutional consultant for the Center for Law and Religious Freedom of the Christian Legal Society, and has authored four books and two law review articles that focus on the interpretation and application of the First Amendment Religion Clauses. Counsel Thomas Stephen Neuberger has also participated in numerous cases involving the Religious Clauses, the First and Fourteenth Amendments, and has co-authored a law review article that focuses on the interpretation and application of the First Amendment Religion Clauses. The Freedom Council believes the combined expertise of its Counsel will be of assistance to the Court. Therefore, this brief is filed to provide the Court with the view of *amicus curiae* on certain legal and historical aspects of this case which to date have not been adequately addressed by the parties.

## SUMMARY OF ARGUMENT

In prior cases, this Court has relied upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the Framers had a different understanding of the degree to which State action constituted "a law respecting the Establishment of religion" from that advanced in the early decisions of this Court reflecting on the Establishment Clause. First, it is clear that the climate of the revolutionary period was fundamentally religious and favored government accommodation of religious belief and expression, provided there was no active state sponsorship of any particular religion sect or practice. Moreover, there is important evidence indicating that Thomas Jefferson and James Madison specifically approved of regular religious meetings for worship and teaching by students on public school campuses. This experience of the Framers from Virginia cannot be discarded when, as this Court has recognized, they played such a leading role in shaping the Constitutional guarantees of religious freedom. The record is clear that the Framers would have sanctioned the guideline in question in the present case.

## ARGUMENT

### The Decision That Voluntary Student Meetings on Campus for Educational, Moral, Religious or Ethical Purposes Violates the Establishment Clause Is in Direct Conflict With the Intentions of the Framers of the United States Constitution as Expressed in the First Amendment.

#### A. The Historical Background of the First Amendment.

From this country's inception, the state and its educational institutions have encouraged and accommodated the practice of religion. From the references to the "Creator" in the Declaration of Independence to the drafting of the First Amendment, it is clear, in the words of the late Judge Charles Fahy, that "[t]he climate of the American revolutionary period, including the period of constitutional development, was fundamentally religious." Fahy, *Religion, Education and the Supreme Court,* 14 Law & Contemp. Prob. 73, 77 (1949). The promotion of religious expression and freedom was of paramount concern to the Framers of the Constitution and, as they saw it, to the health of the Nation. This concern was clearly expressed in the passage of the Northwest Ordinance of 1787 by a Congress composed of many of the drafters of the First Amendment and the Constitution. It reads:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory. Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Ord. of 1787, Jul. 13, 1787,

Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927).

The focus of the revolutionary period was not the eradication of religion from the public schools or public life. Instead, it was to ensure that religious exercise be accommodated. As Professor Arthur Sutherland has written, the history of church and state reveals "an intimate association between government and religion. . . ." Sutherland, *Due Process and Disestablishment,* 62 Harv. L. Rev. 1306, 1318 (1949). Justice Joseph Story, who served on the United States Supreme Court from 1811 to 1845, wrote of this intimate relationship:

> Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. Any attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

J. Story, 2 *Commentaries on the Constitution of the United States* (2d ed., 1851) 593-95.[1]

1. Justice Story's construction has been corroborated by others. T. Cooley, *Principles of Constitutional Law* 224 (1893); Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 Tex. Tech L. Rev. 1, 2-5 (1978).

The Framers of the First Amendment therefore, never intended a complete separation of church and state. Interestingly, that has never occurred. If the intentions of the Framers are ignored, then, as Justice Douglas predicted:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

*Zorach v. Clauson*, 343 U. S. 306, 312-13 (1952). The same might be said of the higher law of the Ten Commandments etched in marble in the Chamber of this Court directly above the seat of the Chief Justice. The predominantly religious orientation and history of the American people mitigates against such hostility toward religion. Any rule of separation that the Framers had in mind when they drafted the First Amendment was adopted in a climate of accommodation and benevolence, not of hostility toward religion.

Of course, this is not to suggest that there was no concern that the State not sponsor, compel or actively participate in religious activity. This too was of concern, especially in states where there was no established State Church. In the words of James Madison, the First Amendment Religion Clauses were prompted because "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to

which they would compel others to conform." Corwin, *The Supreme Court As National School Board,* 14 Law and Contemp. Prob. 3, 11 (1949). The fear of the Framers was that the State would promulgate a statist ideology and force it upon its citizens. To say this, however, is not to say that the Framers would have been apprehensive concerning the desire of a group of students to meet and exchange their ethical, moral, and religious views. The Framers never envisioned, as will be seen in this brief, the situation in the present case where the Constitution would be used to deny the very freedoms they sought to establish.

**B. The View of Thomas Jefferson and James Madison.**

In its early decisions interpreting the Establishment Clause, this Court turned for guidance to the experience of the Virginia Framers. As Justice Black stated in *Everson v. Board of Education,* 330 U. S. 1 (1947):

> . . . Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

330 U. S. at 11. Justice Black relied heavily on James Madison's *Memorial and Remonstrance against Religious Assessments* and Thomas Jefferson's *Bill for Establishing Religious Freedom* as the basis for engrafting Jefferson's post-First Amendment "wall of separation" phrase into

Establishment Clause doctrine. Subsequent scholarship and this Court's more recent opinions, as will be seen below, have put that metaphor into a more balanced and accurate historical context.

It is doubtful that Madison intended the Establishment Clause to effect as complete a separation of church and state as the Court's opinion in the *Everson* case attributes to him. Madison's initial text for the First Amendment in the House of Representatives was worded "'nor shall any national religion be established', and the first provision adopted in the Senate prohibited any 'law establishing articles of faith or a mode of worship. . . .'" 1 *Annals of Congress* 434 (June 8, 1789); 1 *Senate Journal* 77 (September 9, 1789). Madison's second version, reported from committee in the House of Representatives, read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 *Annals of Congress* 729 (August 15, 1789). Madison's understanding, according to the contemporaneous congressional journal, was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Congress* 730. (August 15, 1789). In view of this record of Madison's participation in the drafting process, his 1785 statements contained in the *Memorial and Remonstrance,* though eloquent and even persuasive in context of a local political fight against levying a tax in support of religious instruction, do not fashion the Establishment Clause into the imposing barrier that a doctrinaire reading of Jefferson's metaphor would suggest.[2] Moreover, a surprising

2. Professor Sutherland has pointed out the dangers of making a metaphor into a rule of law:

The wall of separation is a very satisfying metaphor. It has a fine, tangible sound. No one can doubt what a stone wall is. [and

number of scholars agree that Madison's views of separation of church and state expressed at the framing of the First Amendment were not as absolute as those portrayed in the early Religion Clause cases of this Court. *See* Corwin *supra*, at 10-16; Fahy *supra*, at 78-80; Meiklejohn, *Educational Cooperation Between Church and State*, 14 Law & Contempt. Prob. 61, 71 (1949); Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Washburn L. J. 65 (1962); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 Yale L. J. 692, 708-709 (1968); Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1057-1058 n. 11 (1978); M. Malloin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 9-10, 14 (1978); R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 21-36 (1982).

Jefferson was in Paris at the time the First Amendment was introduced and adopted. See Corwin *supra*, at 13. Although his ideas and writing may have influenced the climate for its adoption, there is, unlike for Madison, no direct evidence contemporaneous with the Congress that Jefferson's views did in fact directly influence the debate or drafting of the text of the Religion Clauses. See, e.g., Konvitz, *Separation of Church and State: The First Freedom*, 14 Law & Contemp. Prob. 44, 57 (1949) (whose evidence attributing influence to Jefferson is from years prior to or after the Convention).

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2. (Cont'd.)

then citing Holmes in footnote 15] "The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. . . . Delusive exactness is a source of fallacy throughout the law." *Truax v. Corrigan*, 257 U. S. 312, 342 (1921) (Holmes, J. dissenting).

Sutherland *supra*, at 1311.

Rather than a high and impenetrable barrier, what emerges from study of the relevant utterances of Madison and Jefferson is opposition to active involvement of the State in sponsoring or compelling religious worship and practices or the direct imposition of financial levies in support thereof. Although Jefferson's metaphoric "wall of separation" may not have been "as 'winding as the famous serpentine wall he designed for the University of Virginia' ",[3] it was in Jefferson's time, as much as now, a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman,* 403 U. S. 602, 614 (1971). That the wall of separation was indistinct and variable for Jefferson and Madison is clearly seen in their reaction to issues and facts similar to those presented in this case several years after the adoption of the Religion Clauses.

Jefferson was the founder of the University of Virginia. From its inception, in 1819, the school has been wholly governed, managed and controlled by the State of Virginia. The question of the constitutional limitations with respect to the teaching of religion at the University of Virginia, in particular Christianity, was presented to him. In his annual report as Rector to the President and Directors of the Literary Fund of the University of Virginia dated October 7, 1822, approved by the Visitors of the University of whom James Madison was one, Mr. Jefferson set forth his views in detail as follows:

> It was not . . . to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting

3. *Committee for Public Education v. Nyquist,* 413 U. S. 756, 761 (1973).

from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents therefore, a chasm in general institution of the useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, *to establish their religious schools on the confines of the University,* so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. *Such establishments would offer the further and great advantage of enabling the students of the University to attend religious exercise with the professor of their particular sect, either in rooms of the building still to be erected, and destined to that purpose under impartial regulations,* as proposed in the same report of the commissioners, *or in the lecturing room of such professor.* . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion. . . ."

19 *The Writings of Thomas Jefferson* (Memorial ed., 1904) 414-17 (Emphasis supplied).[4] Simply put, Thomas Jefferson, in order to perpetuate and accommodate the religious beliefs and exercise of the students of the University of Virginia, recommended that students be allowed to meet on the campus to pray and worship together or, if need be, to meet and pray with their professors on campus. Jefferson was not opposed to religious worship and study being conducted on the premises of the University of Virginia. To the contrary, he accepted it as being within constitutional parameters. Moreover, it is clear that the so-called "wall of separation between Church and State" that Mr. Jefferson built at the University of Virginia, which he founded, did not exclude religious education from that school. As Justice Reed once said:

> The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

*Illinois Ex Rel. McCollum v. Board of Education*, 333 U. S. 203, 247 (1948) (Reed, J., dissenting).

James Madison, who with various other Framers was a principal drafter of the First Amendment, was a Member

4. Jefferson's suggestions were adopted by the University of Virginia. The University's regulations drafted pursuant to Jefferson's views provided:

Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within*, or adjacent to, *the precincts of the University*, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour. (Emphasis supplied) *Regulations of the University* (Oct. 4, 1824) Ch. II, Section 1.

of the Board of Visitors which approved the report Jefferson made as Rector, providing a vivid indication of Madison's views on the constitutionality of voluntary religious worship and education in public schools. Moreover, it is interesting to note that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. J. O. Wilson, *Public Schools of Washington*, 1 Records of the Columbia Historical Society 4 (1897). In fact, he "was the chief author of the first plan of public education adopted for the City of Washington." *Id. at* 5. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the public school student. *Id.* at 9.

If this Court is to maintain at least some semblance of allegiance to history and the intentions of the Framers, the freedom to associate voluntarily on the campus for moral, ethical, and religious purposes, as petitioners seek to do, should not for the first time in our history be denied. To rule otherwise would not only distort the law but would run contrary to the wishes of the very men who drafted the document upon which we base our freedom.

## CONCLUSION

Clearly, "[t]he purpose of the establishment clause was not to extirpate religion from public life." Comment, *Secularism in the Law: The Religion of Secular Humanism*, 8 Ohio N. U. L. Rev. 329 (1981). Concerning the mind frame of those who directed the constitutional era and the drive toward separation of church and state, Professor Forkosch writes: "Perhaps the approach was, in some respects, anti-clerical, as a result of Papism, Cromwellism etc., but never antireligious, so that some interrelating and intermeshing of state and religion have always been with us." Forkosch, *Religion, Education, and the Constitution —A Middle Way*, 23 Loyola L. Rev. 617, 632 (1977).

The Court of Appeals decision runs contrary to this central truth. It amounts to a *de facto* establishment in the public schools of what Justice Clark called the "religion of secularism." *School District of Abington Township, Pa. v. Schempp*, 374 U. S. 203, 225 (1963). *See also* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 81 Harv. L. Rev. 513, 586-587 (1968) and *Torcaso v. Watkins*, 367 U. S. 488, 495, n. 11 (1961). As one recent observor has said:

> [It is a] legal fiction that schooling can be value-neutral. By its use of the secular-religious dichotomy the Court has been able to eliminate an obvious form of belief manipulation—religious observance—from public schools, but it has thereby implied that the secular content of schooling does not touch upon the basic beliefs and values of the students . . .

Arons, *The Separation of School and State: Pierce Reconsidered*, 46 Harv. Educ. Rev. 76, 97 (1976).

The Court of Appeals decision, however, goes far beyond banning religious observance to the point of banning

discussion of even moral and ethical issues. The petitioners did no more than accommodate their students' moral, ethical and religious interests in much the same way as was done by the Framers. The petitioners chose to accommodate student interests, thus insuring constitutional rights to develop social, intellectual and cultural awareness and in the process accommodate those who desire to express themselves on moral and ethical issues. As Kauper has noted:

> If the government without dictating or coercing belief on anyone's part recognizes the place of religion in the life of the community, and, without preferring one or more religious groups, accommodates its program and the use of its facilities to religious needs and supports activities in which the government and the churches have a concurrent interest and common concern, religious freedom is not placed in jeopardy. On the contrary, it may be argued that the government is thereby contributing to religious freedom and making it more meaningful.

P. Kauper, *Civil Liberties and the Constitution* 10 (1962).

For decades American educators and students have labored under the dark shadow of the layman's belief that the United States Supreme Court has ruled that nothing of a religious nature can take place on the campus of a publicly supported educational institution even if there is no connection between the activity and the school. And this, despite the fact that Justice Clark, the author of the opinion in *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963), attempted on various occasions to make clear that "the Court has specifically held only one thing with specific reference to prayer in the public schools and that is that required prayer in the public

school violates the Establishment Clause."[5] Moreover, Justice Clark has stated:

> Most commentators suggested that the court had outlawed religious observances in public schools when, in fact, the court did nothing of the kind.

Comment, *Constitutional Law-Religious Exercises and the Public Schools*, 20 Ark. L. Rev. 320, 325, 326 n. 44 (1967).

In drafting their Constitution, the people of the State of Texas, echoing the beliefs of the Framers, proclaimed in their preamble: "Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution." Never in their wildest imaginations did the drafters of this instrument conceive that one day the U. S. Constitution could be argued in such a manner as to prohibit a group of students from meeting on a public school campus in that state.

The decision of the Court of Appeals conflicts with the intentions of the Framers of the First Amendment. It is essential that the conflict be resolved in favor of the petitioners, and that the Court grant a Writ of Certiorari to review the decision below.

Respectfully submitted,

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DATED: November 29, 1982

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5. Published official transcript of Justice Clark's address as the featured speaker of a symposium on *"Religion and the Public School"* at Wartburg College, Waverly, Iowa (Nov. 5, 1964) 46.